

PROCEDURAL HISTORY

On November 6, 2003, Theresa Marie Anderson filed an application for Supplemental Security Income benefits. Plaintiff alleged a disability onset of July 1, 1998. The application was denied initially and upon reconsideration. Plaintiff filed a timely request for a hearing before an administrative law judge (“ALJ”). ALJ Joseph Schloss held a hearing on April 6, 2005. Plaintiff appeared with counsel and testified at the hearing. On June 10, 2005, the ALJ issued a decision denying benefits. Plaintiff sought review of this decision before the Appeals Council, which denied the request for review on June 28, 2006.

Plaintiff commenced the instant action on November 17, 2006.

CONTENTIONS

Plaintiff raises three issues in this action:

1. Whether the ALJ properly considered the psychiatric examination performed by Dr. Susanna Khachatryan.
2. Whether the ALJ posed a complete hypothetical to the vocational expert.
3. Whether the ALJ properly considered the lay witness’s observations of plaintiff.

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), this Court reviews the Commissioner’s decision to determine whether the Commissioner’s findings are supported by substantial evidence and whether the proper legal standards were applied. *DeLorme v. Sullivan*, 924 F.2d 841, 846 (9th Cir. 1991). Substantial evidence means “more than a mere scintilla” but less than a preponderance. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971); *Desrosiers v. Secretary of Health & Human Servs.*, 846 F.2d 573, 575-76 (9th Cir. 1988). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson*, 402

1 U.S. at 401. This Court must review the record as a whole and consider adverse as
 2 well as supporting evidence. *Green v. Heckler*, 803 F.2d 528, 929-30 (9th Cir. 1986).
 3 Where evidence is susceptible to more than one rational interpretation, the
 4 Commissioner's decision must be upheld. *Gallant v. Heckler*, 753 F.2d 1450, 1452
 5 (9th Cir. 1984).

6 7 **DISCUSSION**

8 **A. Issue One.**

9 On June 30, 2001, Susanna Khachatryan, M.D., conducted a comprehensive
 10 psychiatric evaluation of plaintiff. Dr. Khachatryan diagnosed plaintiff with mood
 11 disorder, not otherwise specified; a seizure disorder; and peptic ulcer disease. She also
 12 found that plaintiff had social, functional, and occupational problems and gave plaintiff
 13 a Global Assessment of Functioning ("GAF") score of 54.² (AR 234.) A GAF score
 14 of 54 indicates that the patient has "[m]oderate symptoms (e.g., flat affect and
 15 circumstantial speech, occasional panic attacks) OR moderate difficulty in social
 16 occupational, or school functioning (e.g., few friends, conflicts with peers or co-
 17 workers)." DSM-IV-TR at 34. Furthermore, Dr. Khachatryan opined that plaintiff
 18 might have some limitations in performing complex tasks secondary to her mood
 19 swings, paranoia, irritability, and decreased concentration. (AR 235.) Dr.
 20 Khachatryan also opined that plaintiff might have some limitations in accepting
 21 instructions from supervisors and interacting with co-workers and the public secondary
 22 to her mood swings and irritability. (*Id.*)

23
24
25
26
27 ² The GAF score reflects the psychiatrist or psychologist's judgment of the
 28 patient's overall functioning. American Psychiatric Association, Diagnostic and
 Statistical Manual of Mental Disorders 34 (4th ed., text rev., 2000) (the "DSM IV-
 TR").

1 Plaintiff argues that Dr. Khachatryan's findings indicate that plaintiff suffers
2 from a significant mental impairment and certain functional limitations. Plaintiff
3 contends that the ALJ erred in failing to provide specific and legitimate reasons for
4 rejecting Dr. Khachatryan's opinion. (JS 3-4.) The Court agrees.

5 In evaluating medical opinions, the case law and regulations distinguish among
6 three types of physicians: (1) those who treat the claimant (treating physicians); (2)
7 those who examine but do not treat the claimant (examining physicians); and (3) those
8 who neither examine nor treat the claimant (non-examining physicians). *Lester v.*
9 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995), *limited on other grounds*, *Saelee v. Chater*,
10 94 F.3d 520, 523 (9th Cir. 1996); *see also* 20 C.F.R. §§ 404.1502, 416.927(d). As a
11 general rule, more weight should be given to the opinion of a treating source than to
12 the opinion of doctors who do not treat the claimant. *Winans v. Bowen*, 853 F.2d 643,
13 647 (9th Cir. 1987); *see also* 20 C.F.R. § 416.927(d)(2). The opinion of an examining
14 physician is, in turn, entitled to greater weight than the opinion of a non-examining
15 physician. *Lester*, 81 F.3d at 830; *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir.
16 1990). As is the case with the opinion of a treating physician, the Commissioner must
17 provide "clear and convincing" reasons for rejecting the uncontradicted opinion of an
18 examining physician. And like the opinion of a treating doctor, the opinion of an
19 examining doctor, even if contradicted by another doctor, can only be rejected for
20 "specific, legitimate reasons" that are supported by substantial evidence in the record.
21 *Lester*, 81 F.3d at 830-31.

22 Defendant contends that Dr. Khachatryan opined only that plaintiff "might"
23 have some limitations in performing complex tasks, accepting instructions from
24 supervisors, and interacting with co-workers and the public. (JS 4.) Defendant
25 contends, in essence, that this finding was too inconclusive to merit consideration by
26 the ALJ. (JS 4.) The Court disagrees. As the Court reads Dr. Khachatryan's opinion,
27 in using the term "might," Dr. Khachatryan did not indicate that plaintiff's limitations
28 were doubtful or questionable, but rather that they depended on her mood swings,

1 paranoia, irritability, and decreased concentration. In any case, a doctor's opinion may
2 still be probative even where it couches a limitation in conditional terms. Here, the
3 ALJ may have believed Dr. Khachatryan's opinion to be against the weight of the
4 evidence, but the Court finds that he was still required to set forth specific and
5 legitimate reasons, supported by substantial evidence in the record, for rejecting it. *See*
6 *Lester*, 81 F.3d at 830-31; *see also Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir.
7 1984) (although ALJ need not discuss every item of evidence, he must explain why
8 significant and probative evidence has been rejected).

9 Defendant further contends that even if Dr. Khachatryan's opinion were
10 considered conclusive, the state agency physician, Gina M. Rivera-Miya, M.D.,
11 identified more restrictive functional limitations than those found in Dr. Khachatryan's
12 report. Defendant argues that because the ALJ considered Dr. Rivera-Miya's findings
13 and apparently incorporated them into his determination of plaintiff's limitations, any
14 error in the ALJ's failure to consider Dr. Khachatryan's opinion was harmless. (JS 4-
15 5, citing AR 21, 238-40, 553.) The Court disagrees. The limitations Dr. Rivera-Miya
16 found were *not* uniformly more restrictive than those found by Dr. Khachatryan. In
17 pertinent part, Dr. Khachatryan found that plaintiff might have limitations in accepting
18 instructions from supervisors and interacting with co-workers, secondary to her mood
19 swings and irritability. (AR 235.) Dr. Rivera-Miya, by contrast, found that plaintiff
20 was "not significantly limited" in accepting instructions from supervisors and getting
21 along with coworkers. (AR 239, 240.)

22 As a limitation on accepting instructions from supervisors and interacting with
23 co-workers would be significant and probative as to a claimant's ability to function in
24 the workplace, the Court cannot conclude that it was harmless error for the ALJ to
25 consider Dr. Rivera-Miya's opinion but ignore Dr. Khachatryan's. *See Vincent*, 739
26 F.2d at 1395. Remand is accordingly required for reconsideration of Dr.

27 Khachatryan's opinion. If the ALJ decides to reject Dr. Khachatryan's opinion in

28 ///

1 favor of Dr. Rivera-Miya's opinion, he must provide specific, legitimate reasons,
 2 supported by substantial evidence in the record, for so doing. *See Lester*, 81 F.3d at
 3 830-31.

4 B. Issue Two.

5 1. Dr. Khachatryan's limitations.

6 During the hearing, the ALJ asked the vocational expert, Abbe May, the
 7 following hypothetical question:

8 Q: Okay. I want you to assume a 42-, 43-year-old
 9 individual that has an eighth-grade education, that's
 10 done the same jobs that Ms. Anderson has done, who
 11 has no physical limitations. But on an MFRC form –
 12 do you still have one there?

13 A: I do.

14 Q: On the MFRC form she would be rated as moderate in
 15 Items 3, 5, and 12.³ All others on that form are
 16 deemed not significantly limited. This person can
 17 sustain simple repetitive tasks with adequate pace and
 18 persistence, and can adapt and relate to both coworkers
 19 and supervisors, but should not work with the general
 20 public. Following those guidelines in the hypothetical
 21 could that person do any of the past relevant work that
 22 Ms. Anderson has done?

23
 24
 25
 26 ³ The ALJ was apparently referring to Dr. Rivera-Miya's Mental Residual
 27 Functional Capacity Assessment form, which stated that plaintiff was "moderately
 28 limited" with respect to items 3 ("The ability to understand and remember detailed
 instructions"), 5 ("The ability to carry out detailed instructions"), and 12 ("The ability
 to interact appropriately with the general public"). (*See* AR 238-39.)

1 A: Yes, Your Honor. She could do the assembly work
2 and the home health aide. And depending on the day
3 labor type work, some of that might apply as well.

4 (AR 553.) Plaintiff contends that the ALJ erred in failing to incorporate Dr.
5 Khachatryan's opinion, which indicated that plaintiff might have some limitations in
6 accepting instructions from supervisors and interacting with co-workers, secondary to
7 her mood swings and irritability. (JS 6-7.)

8 Plaintiff is correct in asserting that an ALJ is required to accurately set out the
9 plaintiff's limitations in his hypothetical to the vocational expert. *Andrews v. Shalala*,
10 53 F.3d 1035, 1043-44 (9th Cir. 1995) (remand upheld where hypothetical left out
11 categories of plaintiff's limitations); *Robbins v. Social Sec. Admin.*, 466 F.3d 880, 886
12 (9th Cir. 2006). However, no error occurs where the ALJ's hypothetical to the
13 vocational expert omits limitations claimed but not proven. *Rollins v. Massanari*, 261
14 F.3d 853, 857 (9th Cir. 2001); *see also Osenbrock v. Apfel*, 240 F.3d 1157, 1163-65
15 (9th Cir. 2001). The Court has determined that the matter must be remanded for
16 reconsideration of Dr. Khachatryan's opinion. Accordingly, if the ALJ does not reject
17 Dr. Khachatryan's opinion, the ALJ must include the limitations found by Dr.
18 Khachatryan in a renewed hypothetical to the vocational expert. If the ALJ rejects Dr.
19 Khachatryan's opinion, and provides specific, legitimate reasons, supported by
20 substantial evidence in the record, for so doing, the ALJ need not pose a new
21 hypothetical to the vocational expert.

22 2. Plaintiff's medication.

23 Plaintiff also asserts that the ALJ was required to incorporate into the
24 hypothetical plaintiff's significant medication side effects, namely, drowsiness and
25 sedation. Plaintiff argues that the matter must be remanded in order to properly
26 incorporate the type, dosage, effectiveness, and side effects of plaintiff's medications
27 into a hypothetical question. (JS 7.) Plaintiff does not, however, cite any evidence in
28 the record supporting her allegation that she suffered drowsiness and sedation from her

1 medication. (*See* JS 7, 9.) Moreover, as defendant points out, the record reveals
 2 numerous instances in which plaintiff had the opportunity to complain or show signs
 3 of medication-induced drowsiness to physicians or other medical personnel, but did
 4 not do so. (AR 256-60, 280, 291, 295, 297, 308, 313-16, 318, 321-22, 451-511.)

5 The Court does note that Dr. Khachatryan reported that plaintiff was drowsy at
 6 her psychiatric examination, and that plaintiff stated that her medications (at the time,
 7 Paxil, Neurontin, Effexor, and Trazodone) caused the drowsiness. (AR 233, 231-32.)
 8 However, the ALJ did not err in failing to consider such evidence. The Ninth Circuit
 9 has held that an ALJ may properly reject a claimant's testimony regarding claimed side
 10 effects by using "ordinary techniques of credibility evaluation" and providing a
 11 specific, clear and convincing reason, supported by the record, that the claimant's
 12 testimony was generally not credible. *Thomas v. Barnhart*, 278 F.3d 947, 959-60 (9th
 13 Cir. 2002) (upholding ALJ's finding that claimant generally lacked credibility as
 14 permissible basis for not including claimant's testimony regarding side effects in
 15 hypothetical to vocational expert) (citing *Bunnell v. Sullivan*, 947 F.2d 341, 346 (9th
 16 Cir. 1991), and *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997)); *but see*
 17 *Varney v. Secretary of Health and Human Servs.*, 846 F.2d 581, 585-86 (9th Cir.)
 18 (rejection of testimony regarding side effects requires specific finding that side effects
 19 testimony was not credible), *reversed and remanded on other grounds*, 859 F.2d 1396
 20 (9th Cir. 1988).

21 Here, the ALJ determined that plaintiff "was not a credible witness," and cited,
 22 *inter alia*, her felony convictions and extensive criminal history, which included
 23 assault with a deadly weapon. The Court finds that this was a proper basis for an
 24 adverse credibility determination. *See Albidrez v. Astrue*, 504 F.Supp. 2d 814, 822
 25 (C.D. Cal. 2007) (conviction of, *inter alia*, violent crime of attempted robbery in
 26 violation of California Penal Code §§ 664 and 211 supported finding plaintiff not
 27 credible). That determination, in turn, supported the ALJ's rejection of plaintiff's

28 ///

1 claims regarding her medication's side effects. *See Thomas*, 278 F.3d at 960.

2 Accordingly, the Court affirms the ALJ's decision on this ground.

3 C. Issue Three.

4 On May 14, 2001, Jerry Lee Delen, a friend of plaintiff's, completed a third-
 5 party questionnaire on plaintiff's behalf. In the questionnaire, Mr. Delen indicated that
 6 plaintiff complained of "short sleep periods" and nightmares. Mr. Delen also indicated
 7 that plaintiff never left her house. (AR 102.) With respect to getting along with
 8 others, Mr. Delen reported that plaintiff was "not real Social [*sic*]" and had a
 9 "[t]empermental [d]isposition." (AR 104.) Mr. Delen also noted that plaintiff's mind
 10 drifted and that she did little in the way of chores or tasks around the house. (AR 105.)
 11 Finally, Mr. Delen stated that plaintiff shied away from people, had "little, if Any faith
 12 or trust in Anyone [*sic*]," and had frequent and unexpected mood swings. (*Id.*)

13 Plaintiff contends that the ALJ erred by ignoring Mr. Delen's description of the
 14 effect her impairments had on her daily life. Plaintiff argues that although the ALJ
 15 could reject Mr. Delen's statements, he could not do so without providing reasons that
 16 were germane to Mr. Delen. (JS 10-11.) The Court agrees.

17 20 C.F.R. § 416.913(d) provides that the ALJ "may . . . use evidence from other
 18 sources to show the severity of [an individual's] impairment(s) and how it affects [his]
 19 ability to work." In turn, the Ninth Circuit has repeatedly held that "[d]escriptions by
 20 friends and family members in a position to observe a claimant's symptoms and daily
 21 activities have routinely been treated as competent evidence." *Sprague v. Bowen*, 812
 22 F.2d 1226, 1232 (9th Cir. 1987); *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir.1993)
 23 (ALJ must consider lay testimony concerning a claimant's ability to work); *Stout v.*
 24 *Commissioner, Soc. Sec. Admin.*, 454 F.3d 1050, 1053 (9th Cir. 2006) (same). This
 25 applies equally to sworn hearing testimony of witnesses (*see Nguyen v. Chater*, 100
 26 F.3d 1462, 1467 (9th Cir. 1996)) as well as to unsworn statements and letters of friends
 27 and relatives (*see Schneider v. Commissioner of the Soc. Sec. Admin.*, 223 F.3d 968,
 28 974 (9th Cir. 2000)). As a general rule, if the ALJ chooses to reject such evidence

1 from other sources, he may not do so without comment (*Nguyen*, 100 F.3d at 1467)
2 and he must provide “reasons that are germane to each witness” (*Dodrill*, 12 F.3d at
3 919). However, if the reviewing court can “confidently conclude that no reasonable
4 ALJ, when fully crediting the testimony, could have reached a different disability
5 determination,” the reviewing court may find the error harmless. *Stout*, 454 F.3d at
6 1056.

7 Here, the Court cannot confidently conclude that Mr. Delen’s statement, if
8 believed, would not have made a difference in the ALJ’s disability determination, as
9 Mr. Delen provided probative information that was inconsistent with the ALJ’s mental
10 residual functional capacity assessment. Specifically, Mr. Delen observed that plaintiff
11 had an antisocial temperament and a labile mood. This observation was in accord with
12 Dr. Khachatryan’s opinion that plaintiff might have some limitations in dealing with
13 co-workers a result of her mood swings and irritability – limitations that the ALJ
14 ignored without comment. Accordingly, remand is also required for proper evaluation
15 Mr. Delen’s statement.⁴ If the ALJ again rejects his statement, he must provide reasons
16 for so doing that are germane to Mr. Delen.

17
18
19
20
21
22
23
24
25
26
27 ⁴ The Court agrees with defendant, however, that the ALJ did not err by
28 failing to consider Mr. Delen’s observation that plaintiff never left her house (AR 102),
as the record indicated that plaintiff did, in fact, leave her house to attend doctors’
appointments. (See AR 297, 300, 301, 303.)

CONCLUSION

For the reasons set forth above, the matter requires remand for further proceedings. The judgement of the Commissioner is accordingly reversed and the matter is remanded pursuant to sentence 4 of 42 U.S.C. § 405(g) for further proceedings.

IT IS SO ORDERED.

DATED: March 25, 2008

~~/s/ FREDERICK F. MUMM~~
FREDERICK F. MUMM
United States Magistrate Judge